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Cases Cited.

In the
Supreme Court of the United States

October Term, 1942
No. 590.

CHICAGO, ST. PAUL, MINNEAPOLIS and OMAHA RAILWAY COMPANY, a corporation, Petitioner,

vs.

AMELIA MULDOWNEY, as Special Administratrix of the Estate of HARRY MULDOWNEY, deceased, Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.
STATEMENT OF CASE

An application was made for a Writ of Certiorari by the petitioner, Chicago, St. Paul, Minneapolis and Omaha Railway Company, a corporation. Respondent presents this brief in opposition to the granting of said writ.

This action was originally commenced by Respondent as plaintiff in the United States District Court of Minnesota, Third Division, under the Federal Employer's Liability Act and is predicated under a violation by the petitioner railway company of the Federal Safety Appliance Act in that the Railway Company hauled and used

on its line a car and tender not equipped with couplers coupling automatic on impact and as a proximate result thereof decedent met his death.

At the time of the accident resulting in the death of Harry Muldowney, both he and defendant were admittedly engaged in interstate commerce and transportation. The jury returned a verdict in favor of respondent. Petitioner's motion to set aside the verdict and judgment and for judgment in its favor or for a new trial were denied. Petitioner then appealed to the United States Circuit Court of Appeals for the Eighth Circuit, which Court affirmed the judgment of the District Court. Petitioner's petition for a re-hearing was denied.

II.

STATEMENT OF FACTS

Harry Muldowney had been in the employ of the petitioner-railroad for twenty years in the capacity of a switchman. At the time of his death he was 50 years of age and left surviving him his widow, Amelia Mudowney, age 44 years, and three children, ages 20, 22 and 25. (f. 116, p. 86). He died as a result of injuries sustained by him while in the employ of petitioner-railroad company at its Sioux City, Iowa yard on the morning of March 6, 1941. Train #41 arrived at the 22nd Street Station in the Sioux City, Iowa yard of the petitioner railroad company from Omaha, Nebraska, in the early morning of March 6, 1941. Muldowney was a member of a switch crew employed by petitioner railroad company which was engaged in breaking up the freight train which had just arrived.

After the arrival of the train and before the accident, the only inspection made was a running inspection made

by two of appellant's inspectors who walked along the train on each side from the caboose forward for the purpose of finding "out if possible anything is loose, broken, or dragging along the train from the bolts to the wheels." (f. 176, p. 129).

After such inspection the switching crew took out one cut of cars for switching purposes and then took out a second cut of cars, including the Swift Refrigerator Car No. 18589 (hereinafter referred to as the Swift car), which was involved in the accident. After this second switching operation the Swift car together with three other cars was "kicked" back to the train so that the Swift car was standing on the southerly end of the remaining portion of the train on the North bound main line track, about 20 feet south of the yard office and it so remained after the accident. (f. 53, p. 38). Muldowney was the member of the switch crew who was following the engine and coupled and uncoupled the cars which were to be switched. Muldowney was standing on the Northwest footboard of the tender of the switch engine when the switch engine started to back northerly on the main line track for the purpose of coupling on to the refrigerator car. As the engine was backing toward the Swift car, Foreman Schupp was standing west of the north bound track and approximately 205 feet south of the south end of the refrigerator car. (f. 78, p. 58). Yardmaster Stickles was 20 feet south and 20 feet west of the south end of the Swift car (f. 18, p. 14). Engineer Larson and Fireman Hubble were riding in the switch engine.

The engine was backing at a rate of ten to twelve miles per hour until it reached a point about three car lengths to the south end of the Swift car. It was the

engineer's contention that at a point about three car lengths from the south end of the Swift car the engine was shut off and drifted back, gradually slowing down until it was going two or three miles an hour about eight or ten feet before the accident.

None of the witnesses saw the accident. The first one to suspect something was wrong was Yardmaster Stickles who was standing 20 feet from the south end of the refrigerator car. When he thought it was about time for the engineer to start ahead and the engine did not start, he turned around and observed Muldowney's lighted lantern on the ground between the rails. He ran over and found Muldowney standing upright, between the coupler of the switch engine and the coupler of the Swift refrigerator car (f. 25, p. 19), facing the refrigerator car.

On observing Muldowney between the drawbars, Yardmaster Stickles called to the engineer to move ahead and the engine was moved ahead 20 feet. Foreman Schupp heard the Yardmaster holler to the engineer to slack ahead and immediately ran from where he was standing to the place of the accident. (f. 81, p. 60). From the time the switch engine passed Foreman Schupp, going between 10 and 12 miles per hour (a distance of 205 feet from the accident), until he heard the call of Yardmaster Stickles, two minutes had elapsed. (f. 85, p. 63). After the switch engine had been moved ahead, Yardmaster Stickles took hold of Muldowney and laid him down in the tracks with his feet facing north and his head south. Muldowney moaned but did not talk. An ambulance was called and he was sent to the hospital but died before the doctor reached the hospital. (f. 104, p. 77). After Muldowney was taken to the hospital and within 20 minutes from

the time of the accident, the crew proceeded with the switching operation. The engine was still standing on the same spot, 20 feet South of the Swift car. It had not been moved. (f. 29, p. 22). The knuckle on the Swift car was opened by Schupp. The switch engine backed up for the purpose of coupling onto the Swift car but the coupling did not make. The drawbars on the switch engine and the Swift car were out of alignment to such an extent that a coupling could not be made without an adjustment of the drawbars. (f. 34, p. 25; f. 36, p. 27; f. 92, p. 68; f. 142, p. 104). After the first coupling did not make, Schupp slacked the engine ahead and opened the knuckles on both the Swift car and the switch engine and adjusted the drawbar on the Swift car, in the following manner:

> "Q. And did you get in the middle of it and lift it over to the * * *?
>
> A. I got under the drawbar and lifted it over.
>
> Q. That is right in the center of the drawbar, is that correct?
>
> A. Yes, under there, in the center of the knuckle." (f. 91, p. 67).

After Schupp had adjusted the drawbar on the Swift car the cars coupled automatically. (ff. 33-4, pp. 24-5) (f. 36, p. 27, ff. 90-1, pp. 66-7).

If couplers are lined up correctly they will couple automatically. If they are not lined up correctly it is necessary to adjust them. (ff. 93-4, pp. 69). If the drawbars are out of line the knuckles would hit and close and the coupling would not make. (f. 37, p. 27). When a drawbar is off center it is the usual custom and practice for the brakeman to step between the cars and push or pull the drawbar over with his hands. In the instant case, it was the duty of Muldowney to see that the cars

were properly coupled and if there was an adjustment to be made in the drawbar, it was his duty to make it. (ff. 93-4, pp. 68-9). Normally a coupler has a play of three inches, an inch and a half on each side of the shank, to enable trains to go around curves and to make couplings on curves. (ff. 206-7, p. 152). There being a maximum required play of one and one-half inches on each side, if a coupling on one car is an inch and a half to the east and a coupling on another car is an inch and a half to the west, the coupling would make. (ff. 213-4, p. 157), but if a coupling is out of alignment beyond this maximum play the coupling will not make automatically even though both knuckles are open. There is no device for adjusting the drawbars without going between the cars. They cannot be adjusted by use of the pin lifter.

A knuckle of a coupler works very easily, and may be closed with the fingers. (f. 264, pp. 193-4). An expert witness for Respondent who had 30 years experience as switchman and trainman working for the Omaha Railroad, the Minneapolis and St. Louis, Great Northern, Soo Line and Northern Pacific, who had operated couplers for many years and was familiar with coupling devices, testified that in his opinion the presence of Muldowney's body between the drawbars could not have forced the drawbars out of line (ff. 108-9, pp. 80-1) and the presence of his body between the couplers under the circumstances could cause the coupler knuckles to close. He further said: "I have seen several men in my time caught in that same predicament and we would always find the knuckles closed." (ff. 268-9, pp. 196-7).

THE ISSUES SUBMITTED TO THE JURY

The issues submitted to the jury was whether at the time of the accident petitioner violated the Safety Appliance Act, viz, whether the car and tender were equipped with couplers, coupling automatically by impact and if not, whether such failure was the proximate cause of Muldowney's death. The jury by its verdict determined the issues submitted in favor of the Respondent.

III.

SUMMARY OF ARGUMENT

There was substantial evidence from which the jury could find a violation of the Safety Appliance Act relating to automatic couplers and that said violation was the proximate cause of Muldowney's death.

(A.) Rule of liability under the Federal Safety Appliance Act.

Delk v. St. Louis S. F. R. Co., 220 U. S. 580;
San Antonio Railroad Co. v. Wagner, 241 U. S. 476;
Atlantic City R. C. v. Parker, 242 U. S. 56;
Chicago R. I. Pac. Ry. Co. v. Brown, 229 U. S. 317.

(B.) The record abundantly establishes that the drawbars were out of line to such an extent that it was necessary for Muldowney to go between the cars to adjust them before a coupling could be made.

(C.) The verdict of the jury was based upon reasonable inference and not upon speculation and conjecture.

Geraghty v. Lehigh Valley R. Co., 70 Fed. (2d) 200; Second Circuit;

Williamson v. St. Louis S. F. R. Co., 74 S. W. (2d) 583, 335 Mo. 917.

(D.) The decisions of the Circuit Court of Appeals is not in conflict with applicable decisions of this Court.

Mpls. & St. Louis R. Co. v. Gotschal, 244 U. S. 66;
San Antonio & A.P.R. Co. v. Wagner, 241 U. S. 476;
Atlantic City R. Co. v. Parker, 242 U. S. 56.

(E.) Circumstantial evidence is sufficient to establish liability.

New York Central R. Co. v. Marcone, 281 U. S. 345;
Choctaw O. & G. R. Co. v. McDade, 191 U. S. 65;
Chicago, St. Paul, Mpls. & Omaha R. Co. v. Kulp, (8th Cir.); First Appeal, 88 Fed. (2d) 466; Second Appeal, 102 Fed. (2d) 352;
Burke, etc. v. Lowden, et al, 129 Fed. (2d) 767.

(F.) There was no reversible error in the admission of opinion testimony of respondent's witness, Welton.

San Antonio R. Co. v. Wagner, 241 U. S. 476;
Hampton v. Des Moines and Central I. R. Co., 65 Fed. (2) 899.

IV.

ARGUMENT

There was substantial evidence from which the jury could find a violation of the Safety Appliance Act relating to automatic couplers and that said violation was the proximate cause of Muldowney's death.

(A.) Rule of Liability under the Federal Safety Appliance Act.

There is imposed upon interstate carriers by the Safety Appliance Act an absolute duty to provide every car used in moving interstate traffic with an automatic coupler, and to maintain them in proper condition at all

times and under all circumstances. This duty is not discharged by properly equipping the car with automatic couplers and using due diligence to keep them in good working order.

Delk v. St. Louis S. F. R. Co., 220 U. S. 580.

If a car is not equipped with couplers coupling automatically by impact without the necessity of an employee going between the ends of the cars and by reason of this and as a proximate result of it the employee is injured, the railroad is liable. If the Safety Appliance Act is violated the question of negligence in the general sense of want of care is immaterial. A violation of the Safety Appliance Act is negligence per se. Any misconduct on the employee's part is no more than contributory negligence which is excluded from consideration in a case such as this.

San Antonio & A.P.R. Co. v. Wagner, 241 U. S. 476;

The drawbar is an integral part of the automatic coupling apparatus required by the Safety Appliance Act, and the use of the car with a defective drawbar, or with a drawbar out of line to such an extent as to necessitate an employee going between the cars to align it in making a coupling, is a violation of the Act. The test of compliance with requirements of the law is the operating efficiency of appliances with which the cars are equipped.

San Antonio & A.P.R. Co. v. Wagner, 241 U. S. 476;
Atlantic City R. Co. v. Parker, 242 U. S. 56;
Chicago R. I. Pac. Ry. Co. v. Brown, 229 U. S. 317.

(B.) The record abundantly establishes the fact that the drawbars were out of line to such an extent

that it was necessary for Muldowney to go between the cars to adjust them before a coupling could be made.

It is an admitted fact that immediately after the accident the drawbars on both the engine and the Swift car were out of line to such an extent that a coupling could not be made without an adjustment. After Muldowney was removed, Foreman Schupp opened the knuckle on the Swift car, and an attempt to couple with the engine was made. The coupling did not make. Schupp then slacked the engine ahead and opened both the knuckle on the engine and the Swift car and in addition got in the middle of the knuckle on the Swift car and lifted it over. Thereafter, the coupling made. Welton, an expert of thirty years of experience as a switchman and trainman, who had observed several men in that "same predicament" said that the presence of a man's body between the drawbars would not force them out of line. There was, therefore, competent evidence which would warrant the jury in concluding, and it did so conclude, that the drawbars were out of line prior to the accident to such an extent that a coupling could not be made.

Schupp's conduct is most significant. After the first coupling had been attempted, he not only opened both knuckles, but, in addition thereto, he lifted the drawbar on the Swift car to the east. As an experienced switchman, he knew that even with both knuckles open the coupling could not be made unless he made this additional adjustment. His experience taught him to do the very thing he did in the situation that confronted him. He knew that if couplers are lined up correctly they will couple automatically and if they are not lined up correctly it is necessary to adjust them. He knew that the usual custom and practice when couplings are out of

alignment is for the brakeman to step between the cars and push or pull the drawbars over with his hands. In the instant case, he did not push or pull the drawbar over; but he got under it and lifted it over. If there had been nothing wrong with the coupler, he could have pushed or pulled it over. Under the evidence in this case, when a drawbar cannot be pushed or pulled over, it means either that it is "rusty" or that there is something wrong underneath. In the light of this testimony, the fact that Schupp found it necessary to lift the drawbar over warranted the jury in concluding that there was something wrong with the drawbar.

(C.) The verdict of the jury was based upon reasonable inference and not upon speculation and conjecture.

It is settled law that if, before the accident, the drawbars were out of line and Muldowney necessarily went between the cars to align them, the jury was warranted in returning a verdict for the respondent.

Respondent offered direct evidence that immediately after the accident the drawbars were out of line to such an extent that a coupling could not be made without an adjustment. The foreman of the switch crew opened the knuckle of the coupler on the refrigerator car following which the switch engine attempted to couple onto the refrigerator car, but the coupling did not make with the first impact. It was necessary to make an adjustment before the coupling could be made. (f. 92, p. 68).

Respondent offered further direct evidence of the fact that Muldowney was caught between the drawbars of the refrigerator car in front of the coupler and in the position he would be if he was in the act of adjusting the drawbar by moving it to the center. Schupp, his immediate superior, took the same position when im-

mediately after the accident he found the drawbar so out of line that it would not couple and it was necessary for him to adjust it by pulling it over to the center.

From the substantive evidence offered by the plaintiff, the jury could readily draw the inference that plaintiff's intestate was in the act of adjusting the coupling; that the coupling could not be made; that as the engine approached the refrigerator car with Muldowney standing on the northwest footboard, Muldowney thought it necessary to go between the cars to make the adjustment. Muldowney was a switchman with twenty years' experience. It was his duty to adjust the drawbar. He had been engaged in switching operations for many years. There is no other reasonable inference but that he could see that the coupling could not be made by impact in view of the misalignment of the drawbars unless he went between the cars and aligned them. These inferences could readily have been drawn by the jury. As a matter of fact, we cannot see how they could have drawn any other inference in a death case.

Verdicts for plaintiffs in death cases where the facts were similar have been sustained.

Geraghty v. Lehigh Valley R. Co., 70 Fed. (2d) 300; Second Circuit;

Williamson v. St. Louis S. F. Ry. Co., 74 S. W. (2d) 583; 335 (Mo.) 917.

(D.) The decision of the Circuit Court of Appeals is not in conflict with applicable decisions of this court.

Petitioner cites and relies on the Patton, Looney, Saxon, Chamberlain, Ambrose, Coogan, Babo, Toops and other cases which set forth the proposition of law that a verdict cannot be sustained on mere speculation and

conjecture. None of these cases relate to the Federal Safety Appliance Act involved in this case, and the facts in the cases cited by petitioner are not in any respect similar to the facts in the case at bar.

In a situation such as this, these cases are not controlling in view of the positive duty imposed by the Statute upon the railroad to furnish safe appliances for the coupling of cars.

Mpls. St. Louis R. Co. v. Gotschal, 244 U. S. 66.

The rule of law contended for by petitioner here is not applicable in this case where the verdict of the jury is based upon reasonable inference and the jury's right to infer from the direct substantive evidence offered by plaintiff that drawbars were out of line as the engine upon which Muldowney was riding approached the car and that it was necessary for Muldowney to go between the cars to adjust them, otherwise, a coupling could not have been made, is supported by the ruling of the Supreme Court of the United States in **Atlantic City R. R. Co. v. Parker,** 242 U. S. 56, where it was held that the jury may infer a statutory defect if there is evidence that the required automatic coupling did not occur because there was too much lateral play in the drawbars.

(E.) Circumstantial evidence is sufficient to establish liability.

The facts and circumstances in the case at bar were amply sufficient, we contend, to warrant the finding of the jury that the railroad company violated the provisions of the Safety Appliance Act. Direct proof or eye witnesses are not indispensable. Circumstantial evidence is sufficient to establish liability. This is even true in cases under the Federal Employers' Liability Act where

safety appliances are not involved and plaintiff does not have the benefit of the law which imposes upon the railroad an absolute duty to furnish safe appliances.

New York Central R. Co. v. Marcone, 281 U. S. 345;
Choctaw O. & G. R. Co. v. McDade, 191 U. S. 65;
Chicago, St. Paul, Mpls. & Omaha R. Co. v. Kulp, (8th Cir.) First Appeal, 88 Fed. (2d) 466; Second Appeal, 102 Fed. (2d) 352;
Burke, etc. v. Lowden, et al, 129 Fed. (2d) 767.

Petitioner in its brief, page 17, presents the argument that: "There is no direct evidence that, had Muldowney's body not intervened, the coupling would not have made automatically on impact, without the necessity of a prior shifting of the car drawbar by Muldowney, nor is there direct evidence that in fact he was so engaged or that he went between the car and tender for that purpose." There is direct evidence of the fact that after the accident both drawbars were found out of line to such an extent that a coupling failed to make. It was Muldowney's duty to adjust drawbars if they needed adjustment. An adjustment could not be effected without going between the cars. The drawbar could not be adjusted by use of the hand lever. The jury did not have to speculate to determine that Muldowney with 20 years' switching experience, ascertained as the engine on which he was riding approached the refrigerator car that the coupling could not be made due to the misalignment of the drawbars, and having inferred this, it meant that the railroad company violated the provisions of the Safety Appliance Act, the proximate result of which violation resulted in his death.

(F.) There was no reversible error in the admission of opinion testimony of Respondent's witness, Welton.

A witness with many years practical experience, well qualified to express an opinion, testified that the presence of Muldowney's body between the drawbars could not have forced the drawbars out of line and that under the circumstances the impact of the switch engine against a man's body between the couplers would cause the coupler knuckles to close if they were open. As pointed out by the Circuit Court of Appeals in its opinion, proper foundation was laid for this testimony. Opinions expressed by railroad men in railroad service having practical experience in the operations involved in the case before the court and jury are proper for the consideration of the jury. The weight and credibility of the testimony was for the jury.

San Antonio R. Co. v. Wagner, 241 U. S. 476;

Hampton v. Des Moines & Central I. R. Co., 65 Fed. (2d) 899.

V.

CONCLUSION

Considering that plaintiffs' action is predicated upon the Safety Appliance Act which imposes upon the petitioner railroad company the absolute duty to provide its cars with couplers which at all times are in an efficient operating condition, and with the proof which was before the jury in this case, we submit that the jury could not have reasonably drawn any other conclusion than that the railroad here violated the provisions of the Safety Appliance Act proximately causing the death of respondent's intestate.

We contend that the verdict of the jury and the decisions of the Circuit Court of Appeals should be affirmed. The issues in the case presented fact questions for the jury. No construction of Federal Statute is involved and no undetermined principal of law or practice is involved. The petition should be denied.

Respectfully submitted,

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